IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Smt. Saroj Devi Vs. The State of Rajasthan & Others
(SB Civil Writ Petition No.4588/1997)

SB Civil Writ Petition under Article
226 of the Constitution of India.

Date of order: November 20, 2006.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA

Mr. D.K.Garg, for the petitioner.

Mr. M.L.Goyal, Addl. Government Advocate for respondents.

BY THE COURT:

When the petitioner became pregnant even after Tubectomy operation, she approached this Court for claiming adequate and reasonable compensation.

2. The only point for consideration in this writ petition is whether relief can be granted to the petitioner under Article 226 of the Constitution or will it be proper to relegate the petitioner to ordinary remedy of civil suit?

3. I have pondered over the rival submissions.

4. In Nilabati Behera @ Lalita Behera Vs. State of Orissa (1993 ACJ 787) their Lordships of the Supreme Court indicated that in order to grant relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of

India, it is not always enough to relegate him to the ordinary remedy of civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. In that case the facts that Suman Behera was taken in police custody on December 1, 1987 at 8 am and he was found dead on the next day on the railway track near the Police Outpost Jeraikela, without being released from custody and his death was unnatural caused by multiple injuries sustained by him were not in dispute.

5. In Nilabati Behera @ Lalita Behera Vs. State of Orissa (supra) their Lordships of the Supreme Court indicated thus:-

(para 32)

> "Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve `new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the Title "Freedom under the Law", Lord Denning to his own style warned:
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> > "No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But

> if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and uptodate machinery, by declarations, injunctions and actions for negligence... This is not the task for Parliament... the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised, the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country.""

6. The facts of Nilabati Behera (supra) were not in dispute. Suman Behera who was taken in police custody on December 1, 1987 at 8 AM was found dead on the next day on the Railway Track near the Police Outpost without being released from the custody and his death was unnatural caused by multiple injuries sustained by him. But in the instant case the facts are disputed. The respondents have not admitted that Tubectomy operation was failed on account of negligence of the doctor. Questions of facts that involved in this writ petition are:-

(1) Whether Doctors were negligent in performing Tubectomy operation?

(2) Whether after the Tubectomy operation the petitioner took all necessary precautions?

These questions can only be adjudicated after recording the evidence. Since the petitioner has efficacious remedy of civil suit to claim damages, no relief can be granted to her under Article 226 of the Constitution of India.

7. For these reasons, the writ petition stands dismissed without any order as to costs.

(Shiv Kumar Sharma),J.

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